Supreme Court, U.S.
FILED
00 195 JUL 18 2000
OFFICE OF THE CLERK

No. 00-

IN THE
Supreme Court of the United States

JOSEPH and MARIA RIGA,

Petitioners,

v.

RONALD and FAYE ALEXANDER and FAIR HOUSING PARTNERSHIP OF GREATER PITTSBURGH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. HARDIMAN
Counsel of Record
JOSEPH P. MCHUGH
REED SMITH SHAW & MCCLAY LLP
Attorneys for Petitioners
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-4230/7236

160202

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

118PP

QUESTIONS PRESENTED

Whether a fair housing organization can create standing for itself by investigating allegations of discrimination and then suing the target of that investigation.

Whether a party suing for race discrimination under the Fair Housing Act needs to prove only that the discrimination occurred in order for the landlord to be liable.

Whether punitive damages can be awarded under the Fair Housing Act absent an award of nominal or compensatory damages.

Whether a husband can be vicariously liable for punitive damages based on the discriminatory conduct of his wife.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. The Court Of Appeals' Decision On Standing Exacerbates An Existing Split Among The Circuits And Undermines This Court's Holding In *Havens*	6
II. The Court Of Appeals' Decision That Discrimination Equals Harm Involves An Important Federal Question And Conflicts With Decisions Of This Court And Another Court Of Appeals	11

Contents

Page

III. The Court Of Appeals' Decision That Punitive Damages Can Be Awarded Absent An Award Of Nominal Or Actual Damages Conflicts With The Decisions Of Other Courts Of Appeal 19

IV. The Court Of Appeals' Decision On Vicarious Liability For Punitive Damages Exceeds The Outer Bounds Of This Court's Recent Decision In *Kolstad* 21

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 15

Carey v. Piphus, 435 U.S. 247 (1978) 12, 13, 14, 15, 16, 18

Chauhan v. M. Alfieri Co., 897 F.2d 123 (3d Cir. 1990) 16

Curtis v. Loether, 415 U.S. 189 (1974) 12, 13, 17

Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994) 7, 8, 9

Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998) 7, 8, 9, 11

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 6, 7, 11

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 12, 16

Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993) ... 7

Kolstad v. American Dental Association, 527 U.S. 526 (1999) 21, 22, 23, 24, 25

Cited Authorities

Page

Louisiana ACORN Fair Housing v. LeBlanc, 211 F.3d 298 (5th Cir. 2000) 7, 8, 10, 20, 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 12, 16

People Helpers Foundation, Inc. v. City of Richmond, Va., 12 F.3d 1321 (4th Cir. 1993) ... 20

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 12

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000) 12, 17

Selden Apartments v. United States Department of Housing and Urban Development, 785 F.2d 152 (6th Cir. 1986) 16

Smith v. Wade, 461 U.S. 30 (1983) 22

Spann v Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990) 7, 8, 9, 11

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 12

Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) 7

Walker v. Anderson Elec. Connectors, 944 F.2d 841 (11th Cir. 1991) 17, 18

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	4
28 U.S.C. § 2101(c)	1
42 U.S.C. § 1981, *et seq.*	4
42 U.S.C. § 1981(a)(b)(1)	22
42 U.S.C. § 3601, *et seq.*	4
42 U.S.C. § 3602	2
42 U.S.C. § 3604	2
42 U.S.C. § 3613	2
42 U.S.C. § 3613(a)(1)(A)	17
United States Constitution:	
Article III, Section 2	2, 11
Other Authorities:	
C. McCormick, *Law of Damages* 280 (1935)	23
Restatement (Second) of Agency, § 217 C	23
Restatement (Second) of Torts § 909, Comment b	23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed March 22, 2000 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Western District Of Pennsylvania Dated October 9, 1998 ..... 31a

Appendix C — Amended Judgment In The United States District Court For The Western District Of Pennsylvania Dated October 9, 1998 ..... 55a

Appendix D — Memorandum And Order Of The United States District Court For The Western District Of Pennsylvania Dated March 10, 1998 ..... 57a

Appendix E — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated April 19, 2000 ..... 83a

Petitioners respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review its judgment in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, from which this appeal is taken, is reported at *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000), and appears as Appendix A ("App. A") hereto. The District Court opinions and Judgment, which are unreported, appear as Appendix B ("App. B"), Appendix C ("App. C") and Appendix D ("App. D") hereto.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on March 22, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing *en banc* on April 19, 2000, which appears as Appendix E ("App. E").

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, Section 2 of the United States Constitution and the Fair Housing Act at 42 U.S.C. §§ 3602, 3604 and 3613.

Article III, Section 2 of the Constitution provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority. . . .

The Fair Housing Act provides, in pertinent part:

> § 3602(f): "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.
>
> § 3604: As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful —
>
> > (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

* * *

> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

§ 3613(a)(1)(A): An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

§ 3613(c)(1): In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages. . . .

STATEMENT OF THE CASE

Joseph and Maria Riga (the "Rigas"), an Italian-American couple, own an apartment building in Pittsburgh, Pennsylvania, in which there was a unit for rent in the Fall of 1995. Mrs. Riga had full responsibility for leasing and collecting rents for the apartment building, with Mr. Riga serving as the handyman. In the Fall of 1995, Mr. Riga was in Italy and, though aware there was a vacant apartment and that Mrs. Riga had advertised its availability, he never discussed with his wife any aspect of her efforts to rent the

apartment. In September 1995, Ronald and Faye Alexander (the "Alexanders"), who are African-American, arranged with Mrs. Riga to view the apartment; but the Alexanders claim that when they arrived for the appointment she told them it was no longer available. Mr. Alexander suspected that Mrs. Riga was lying and, with the help of some friends, he established through additional phone calls and investigation that the apartment was still available.

After Mr. Alexander had established the apartment's availability, he made further efforts to view the apartment under a different name; and, through an attorney, he contacted the Fair Housing Partnership of Greater Pittsburgh, Inc. ("FHP"), an organization which conducts testing for discriminatory housing practices in Pittsburgh and engages in outreach efforts to abate discrimination. FHP sent two testers to the apartment building, each of whom briefly viewed the apartment and wrote reports of their tests, confirming what Mr. Alexander had already established — that the apartment had been available when the Alexanders tried to view it. FHP paid each tester $25.

With that minimal and gratuitous involvement, FHP then joined the Alexanders in suing the Rigas for racial discrimination in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq*. The Alexanders also alleged discrimination in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, *et seq*. The Alexanders and FHP invoked the jurisdiction of the District Court under 28 U.S.C. § 1331 (general federal question jurisdiction). The Alexanders sought compensatory and punitive damages and FHP sought compensatory damages.

The Rigas moved for summary judgment, arguing that the Alexanders could not prove they were qualified to rent the apartment. The Rigas also argued that FHP lacked standing to sue because it suffered no perceptible impairment to its programs and it attempted to confer standing on itself by becoming involved in a lawsuit. Indeed, FHP was merely doing what it received hundreds of thousands of federal dollars to do — investigate discrimination.[1] The District Court denied the summary judgment motion. App. D at 82a. On the eve of trial, Respondents voluntarily dismissed all claims except their respective FHA claims.

A jury trial was held in May 1998. The District Court bifurcated the issue of punitive damages and did not submit that issue to the jury with the issues of liability or compensatory or nominal damages. App. B at 41a. The jury found that Mrs. Riga had discriminated against the Alexanders in violation of the FHA but concluded that the discrimination had not been a legal cause of harm to the Alexanders. *Id.* at 33a. Accordingly, the Alexanders were not awarded any damages. *Id.* The jury concluded that the discrimination against the Alexanders had been a legal cause of harm to FHP but awarded zero dollars in damages. *Id.* at 34a. The District Court refused to send the issue of punitive damages to the jury because Mrs. Riga's discrimination had not caused harm to the Alexanders and her conduct did not rise to the level necessary to permit the jury to consider imposing punitive damages. *Id.* at 41a. The District Court entered judgment for the Rigas against the Alexanders and judgment for FHP against the Rigas but with no damages awarded to FHP. App. C at 55a-56a.

---

1. In 1995, FHP received $274,000 in federal funds.

On cross-appeals, the Court of Appeals reversed the judgment and remanded the case to the District Court for trial on the issue of punitive damages. App. A at 30a. The Court of Appeals held: (i) that discrimination automatically equals harm under the FHA, thus the Rigas were liable to the Alexanders despite the jury's finding that Mrs. Riga's discrimination had not harmed the Alexanders (*id.* at 12a); (ii) that punitive damages could be awarded regardless of the egregiousness of Mrs. Riga's conduct and even though neither nominal nor actual damages had been awarded (*id.* at 18a and 20a); and (iii) that Mr. Riga, on agency principles, could be vicariously liable for punitive damages for his wife's discriminatory conduct (*id.* at 26a). Finally, addressing an issue raised by the Rigas in their cross-appeal, the Court of Appeals in summary fashion determined that FHP had Article III standing as an "aggrieved person" under the FHA. *Id.* at 11a, n.4.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION ON STANDING EXACERBATES AN EXISTING SPLIT AMONG THE CIRCUITS AND UNDERMINES THIS COURT'S HOLDING IN *HAVENS*

The court below held that merely incurring litigation expense is sufficient injury in fact to confer standing on a fair housing organization. App. A at 11a, n.4. That decision further widens a split among the courts of appeals which have considered the issue and undermines this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

This Court has held that a fair housing organization does not have standing to sue for an FHA violation unless the defendant's actions have "perceptibly impaired" the organization's mission. *Id.* at 372. During the past decade, a split has developed among the circuits as to whether the mere expenditure of resources on litigation constitutes impairment sufficient to warrant standing. *Compare Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994); *Spann v Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998); and *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000) (time and money spent bringing suit cannot constitute injury in fact) with *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) and *Hooker v. Weathers*, 990 F.2d 913 (6th Cir. 1993) (deflection of time and money from counseling to legal efforts is sufficient injury to confer standing).

The D.C. Circuit Court of Appeals and the Third Circuit Court of Appeals have explicitly recognized the split. The D. C. Circuit stated: "We disagree with the Seventh Circuit that *Havens* would support such a purely self-referential injury." *Fair Employment Council of Greater Washington*, 28 F.3d at 1277. And the Third Circuit similarly noted that "[a] number of our sister courts have . . . adopted different views of whether the injury necessary to establish standing flows from the expenses associated with litigation." *Fair Housing Council of Suburban Philadelphia*, 141 F.3d at 78-79 (footnote omitted).

The District Court also acknowledged the split when it denied the Rigas summary judgment on the issue of FHP's standing. App. D at 77a-79a. In cursory fashion, the Court

of Appeals rejected the Rigas' appeal of that decision. App. A at 11a, n.4. The split is now more severe. Since the decision of the Court of Appeals in this case, the Fifth Circuit has denied standing to a fair housing organization on facts virtually identical to those in the instant case. *See Louisiana ACORN Fair Housing*, 211 F.3d at 305. Moreover, the Court of Appeals' decision in this case has created confusion within the circuit because it is directly contrary to its decision in *Fair Housing Council of Suburban Philadelphia* issued by the court two years earlier — a decision which the court did not even mention in its opinion, let alone expressly overrule.

The dispute centers on whether a fair housing organization can manufacture standing for itself by doing what it exists to do (investigate discrimination) and then suing for the resulting "diversion of resources." The Court of Appeals in *Fair Housing Council of Suburban Philadelphia* specifically rejected the Fair Housing Council's argument that "the diversion of resources to litigation is alone sufficient to confer standing under Article III." 141 F.3d at 78. In reaching its decision, the court cited with approval the reasoning of the D.C. Circuit in *Spann* and *Fair Employment Council of Greater Washington*. *Id.* at 79.

Summarizing the import of *Spann* and *Fair Employment Council of Greater Washington*, the Third Circuit held: "the pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III." *Fair Housing Council of Suburban Philadelphia*, *Id.* at 80. As the D.C. Circuit explained, if the pursuit of litigation could confer standing:

> the time and money that plaintiffs spend in bringing suit against a defendant would itself

> constitute a sufficient "injury in fact," a circular position that would effectively abolish the [injury in fact] requirement altogether. Indeed, an organization devoted exclusively to advancing more rigorous enforcement of selected laws could secure standing simply by showing that one alleged illegality had 'deflected' it from pursuit of another. . . .

Fair Employment Council of Greater Washington, 28 F.3d at 1277 (citation omitted).

In the instant case, the Court of Appeals, without explanation, summarily rejected the reasoning which it had embraced in *Fair Housing Council of Suburban Philadelphia.* It noted only that "the FHP staff 'stopped everything else' and devoted all attention to this case. It, moreover, diverted resources to investigate and to counter the Rigas' conduct." App. A at 11a, n.4. The court did not cite to the record in characterizing FHP's conduct. The District Court more carefully described the involvement of FHP in its memorandum denying summary judgment to the Rigas, accepting the facts as pled by FHP. That description indicates that FHP sent two testers to the apartment and then joined in the lawsuit. App. D at 63a-66a. A third tester recruited by the Alexanders' attorney on behalf of FHP did nothing more than call Mrs. Riga. App. D at 66a.

Sending two testers to view an apartment for purposes of litigation does not constitute the type of injury in fact that warrants standing, for the reasons articulated previously by the Court of Appeals in *Fair Housing Council of Suburban Philadelphia*, by the D.C. Circuit in *Spann* and *Fair Employment Council of Greater Washington* and, most

recently, by the Fifth Circuit in *Louisiana ACORN Fair Housing*. FHA's mission was not impaired by its investigation of the Rigas' alleged discrimination; therefore it suffered no injury sufficient to confer standing.

In *Louisiana ACORN Fair Housing*, as in this case, an individual approached a fair housing organization *after* he believed he had been the victim of discrimination. *Louisiana ACORN Fair Housing*, 211 F.3d at 299. The organization conducted testing, concluded there had been discrimination and joined the individual in suing the landlord. *Id.* The Fifth Circuit held that ACORN lacked standing because it "did not demonstrate at trial any impairment in facilitating open housing. At best, ACORN proved the resources it expended [on the litigation]; . . . but it did not prove a drain on its resources." *Id.* at 305. ACORN's executive director had testified only that the litigation had "started to take over an inordinate amount of our work time and staff time of our normal activities" and that ACORN had to "go back out and repair the damage that's been done . . . to make up for that lost ground that was taken away from us during the course of this particular complaint. . . ." *Id.* The Fifth Circuit deemed such testimony "conjectural, hypothetical and speculative" and inadequate to confer standing. *Id.* at 306.

The facts cited in *Louisiana ACORN Fair Housing* are indistinguishable from the damage claimed by FHP in the present case. FHP did nothing more than send two testers to check on a discrimination complaint. Its mission was not impaired. It did what it exists to do. As the Court of Appeals noted prior to its holding in this case, "*Havens* makes clear . . . that an organization establishes Article III injury if it alleges that purportedly illegal action increased the resources the group must devote to programs independent of the suit

challenging the action," *Fair Housing Council of Suburban Philadelphia*, 141 F.3d at 79 (quoting *Spann*, 899 F.2d at 27). Impairment means being prevented from doing what the organization exists to do. FHP here was not diverted from doing what it exists to do. It investigated the Rigas.

This Court should grant certiorari to resolve the split which has emerged in the wake of *Havens* and to prevent a torrent of gratuitous litigation. If FHP has standing in this case, fair housing organizations and any other interest groups across the country will have standing in every case in which they choose to involve themselves. The injury in fact requirement will be eviscerated in contravention of the plain language and intent of Article III, Section 2 of the Constitution. The intervention of this Court is necessary to vindicate Article III's standing requirements and to prevent wasteful, ubiquitous litigation by special interest groups that attempt to manufacture standing by "throwing themselves in front of the proverbial train."

II.

THE COURT OF APPEALS' DECISION THAT DISCRIMINATION EQUALS HARM INVOLVES AN IMPORTANT FEDERAL QUESTION AND CONFLICTS WITH DECISIONS OF THIS COURT AND ANOTHER COURT OF APPEALS

The Court of Appeals determined that discrimination automatically equals harm under the FHA. App. A at 12a. In other words, proof of discrimination is all that is necessary to impose liability. Without citing any precedent, the Court of Appeals held that if a plaintiff "proves discrimination, he or she need not prove anything else. . . . The 'harm' is the

discrimination." *Id.* The Court of Appeals thus concluded that the District Court "misstated the proper legal standard in this Fair Housing Act case by requiring 'legal causation' beyond a showing of illegal discrimination." *Id.* at 13a. In jettisoning causation, the Court of Appeals contradicts several decisions of this Court which require causation in civil rights actions. The Court of Appeals' decision puts a previously settled, fundamental federal question, *viz.*, the elements which must be proven in a federal housing discrimination case, at issue.

The Supreme Court addressed the causation requirement in discrimination and other civil rights actions in three seminal cases in the 1970's: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Curtis v. Loether*, 415 U.S. 189 (1974); and *Carey v. Piphus*, 435 U.S. 247 (1978). Indeed, *McDonnell Douglas* has spawned a series of decisions in which the Court has gone to great lengths to explain what a plaintiff must do to prove harm because of discrimination. *See, e.g., Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000). In each of these cases, causation was an essential element of a civil rights action. In one fell swoop, the Court of Appeals' declaration that discrimination equals harm contradicts all of these decisions of this Court.

In *Curtis v. Loether*, 415 U.S. 189 (1974), a Fair Housing Act case, this Court stated that "if a plaintiff proves unlawful discrimination *and* actual damages, he is entitled to a judgment for that amount." *Id.* at 197 (emphasis added). This Court did not state that if a plaintiff proves discrimination

he or she is entitled to a judgment. The Court in *Curtis* explicitly noted a causation requirement, observing that a damages action under the FHA "sounds basically in tort — the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff *for the injury caused by* the defendant's wrongful breach." *Id.* at 195 (emphasis added).

The Court in *Carey v. Piphus*, 435 U.S. 247 (1978), repeatedly affirmed the requirement of causation before focusing on whether, in the case before it, actual damages had been proven or whether only nominal damages could be awarded:

> • Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries *caused by* the deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, *do not exist in a vacuum*. Their purpose is to protect persons from injuries to particular interests. . . .

Id. at 254 (emphasis added);

> • [T]he principle that damages are designed to compensate persons for injuries *caused by* the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871.

Id. at 255 (emphasis added) (footnote omitted);

> • [O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated for injuries *caused by* the violation of his legal rights. These rules . . . provide the appropriate starting point for the inquiry under § 1983 as well.

Id. at 257-58 (emphasis added) (footnote omitted);

> • In [certain] cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries *caused by* the deprivation of a constitutional right.

Id. at 258 (emphasis added);

> • The purpose of § 1983 would be defeated if injuries *caused by* the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

Id. at 258 (emphasis added) (citations omitted);

> • In order to further the purpose of § 1983, the rules governing compensation for injuries *caused by* the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question. . . .

Id. at 258-59 (emphasis added);

> • We agree with Mr. Justice Harlan that "the experience of judges in dealing with private [tort] claims supports the conclusion that the courts of law are capable of making the types of judgment concerning *causation and magnitude of injury* necessary to accord meaningful compensation for invasion of [constitutional] rights."

Id. at 259 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 409 (1971)). This Court also noted that injury from mental and emotional distress "cannot be presumed to occur" and plaintiffs "should be put to their proof on the issue, as plaintiffs are in most tort actions." *Id.* at 262.

In *Carey*, the Court required proof of causation even where an absolute constitutional right (procedural due process) was at issue. The plaintiffs were students who had been suspended from school without a proper hearing. The Court agreed with the Seventh Circuit Court of Appeals that if the students would have been suspended after receiving proper process, they could not recover compensatory damages because the inadequate process "could not properly be viewed as the cause of the suspensions." *Carey*, 435 U.S. at 260. Moreover, substantial damages could not be awarded to compensate the students for the injury inherent in the nature of the wrong. *Id.* at 260-61. But nominal damages could be awarded without proof of actual injury because "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions. . . ." *Id.* at 266.

What the Court of Appeals has done here is equate racial discrimination under the FHA with a procedural due process violation in which harm automatically flows from the violation. Such a result is inconsistent with this Court's careful analysis in *Carey*. The right to be free from racial discrimination in housing is neither absolute nor constitutional. It is a statutory right which depends entirely on the merits of the plaintiff's substantive assertions. Discrimination that does not cause legal harm is conceivable. An individual might or might not be offended or upset or otherwise suffer legal harm because of a discriminatory action. It depends on the specific facts of the case and whether a jury believes the plaintiff's evidence of those facts.

It is precisely because discrimination does not always cause legal harm that the Court has so precisely articulated a framework for proving harm in discrimination actions. Perhaps the most egregious aspect of the Court of Appeals' assertion that discrimination equals harm is its complete disregard for the *McDonnell Douglas* line of cases. The *McDonnell Douglas* test has been applied to the range of discriminatory-treatment cases (including the leasing context, *see, e.g.*, *Chauhan v. M. Alfieri Co.*, 897 F.2d 123 (3d Cir. 1990); *Selden Apartments v. United States Department of Housing and Urban Development*, 785 F.2d 152 (6th Cir. 1986)); and it plainly contemplates a causation requirement.

Under *McDonnell Douglas*, once the plaintiff puts forth a *prima facie* case of discrimination, the defendant must articulate a non-discriminatory reason for the challenged action, and, if the defendant does so, the plaintiff then must prove that the protected trait "actually motivated the [defendant's] decision." *Hazen Paper*, 507 U.S. at 610,

cited in Reeves, 120 S. Ct. at 2105. If, as the Court of Appeals held, discrimination equals harm, the plaintiff should not have to prove that his or her race actually motivated the defendant's decision. It should be enough to prevail if race was involved in the process in any way.

But that is not the law. Causation remains an essential requirement in discrimination actions. The law is clear: (1) a rights violation; (2) causing harm to plaintiff; (3) permits recovery of some sort. The Court of Appeals has severed the middle link, resulting in an unprecedented expansion of liability under the Fair Housing Act.

Remarkably, the Court of Appeals' only basis for this sea change is the language of the FHA which authorizes "appropriate relief" for a violation. App. A at 11a (quoting 42 U.S.C. § 3613(a)(1)(A)). Such language merely begs the question of when relief is appropriate. The Court of Appeals gives a "plain language" reading of the statute which is quite contrary to this Court's reading in *Curtis*. Far from construing the FHA to mean that housing discrimination plaintiffs need prove nothing more than discrimination, this Court stated that a "damage action under the statute sounds basically in tort — the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury *caused by* the defendant's wrongful breach." *Id.* at 195 (emphasis added).

The Court of Appeals' assertion that discrimination equals harm also creates a split with the Eleventh Circuit Court of Appeals. The jury in *Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir. 1991), found that the defendant had committed sexual harassment in violation of Title VII but that the plaintiff had sustained no damage as a

proximate result of those violations. *Id.* at 843. The district court entered judgment for the defendant and the Eleventh Circuit affirmed. The Third Circuit's holding in this case that discrimination equals harm directly contradicts the *Walker* decision.

The Court of Appeals has gone down this lonely road for no good reason. Given this Court's longstanding recognition that discrimination law is akin to tort law, which requires proof that harm has been caused by the wrongdoing alleged, the notion that a party must prove harm has been so uncontroversial that there is virtually no case law on the subject. The causation issue may not be controversial precisely because in the vast majority of cases the burden of proving harm should be easily met. As this Court recognized in the context of a constitutional violation:

> [W]e foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.

Carey, 435 U.S. at 263-64 (footnote omitted).

As the Court of Appeals would concede, given its reference to the "saddening detail" with which the Alexanders described Mrs. Riga's deceptions, the Alexanders took full advantage of the opportunity to show the nature and circumstances of the wrong attributed to Mrs. Riga. App. A at 22a. But the Alexanders also obviously failed to persuade the jury that such discriminatory conduct was the

cause of any harm to them. Hard cases make bad law and here it is evident that the Court of Appeals disliked the jury's conclusion that no harm had been caused. That is no basis, however, for discarding a causation requirement that has been applied consistently in statutory civil rights cases and has been a bedrock principle of the common law for centuries. The Court of Appeals has created a split on a previously uncontested issue in discrimination law, a split which discrimination plaintiffs certainly will seek to exploit. Certiorari should be granted to return clarity and certainty on this fundamental point — that discrimination plaintiffs cannot prevail if they do not prove that discrimination caused them harm.

III.

THE COURT OF APPEALS' DECISION THAT PUNITIVE DAMAGES CAN BE AWARDED ABSENT AN AWARD OF NOMINAL OR ACTUAL DAMAGES CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL

In elliptical fashion, the Court of Appeals held that punitive damages can be awarded under the FHA absent an award of nominal or compensatory damages. App. A at 18a. The court noted that punitive damages can be awarded for constitutional violations even where nominal or compensatory damages have not been awarded but failed to acknowledge that the case before it involved a statutory not a constitutional violation; and it remanded the case for a trial on punitive damages. *Id.* at 18a and 30a. Thus, it is evident that the court decided that punitive damages can be awarded for a statutory violation absent nominal or compensatory damages. This conflicts with decisions of the Courts of

Appeals for the Fourth and Fifth Circuits. *See People Helpers Foundation, Inc. v. City of Richmond, Va.*, 12 F.3d 1321 (4th Cir. 1993); *Louisiana ACORN Fair Housing*, 211 F.3d at 303 (explicitly noting that federal courts "have become more divided on this punitive damages question").

In *People Helpers*, the Fourth Circuit reversed a one dollar punitive damages award in an FHA case where no nominal or actual damages had been awarded. *People Helpers*, 12 F.3d at 1326-27. The court noted that there is "no established federal common law rule" and that the FHA "is silent on the issue of punitive damages and is of no help as we consider this issue." *Id.* at 1326 (citation omitted). The court then turned to state case law, observing that "[a] majority of the fifty states prohibit punitive damages awards when a fact finder fails to award compensatory damages" and that "[i]n the absence of a specific statutory directive on this issue, federal courts have chosen to apply the majority rule that punitive damages are not recoverable when compensatory damages have not been awarded." *Id.* at 1327.

Less than two months ago, the Fifth Circuit agreed with the Fourth Circuit's result (though not its reasoning) and rejected the Third Circuit's contrary decision in this case. *See Louisiana ACORN Fair Housing*, 211 F.3d at 303. The Fifth Circuit was dissatisfied with the Fourth Circuit's reliance on state case law rather than federal civil rights case law, which it reviewed in an effort to determine the appropriate federal common law rule. In this regard, the Fifth Circuit noted: "Although the goal of a federal common law of damages is to produce uniform results, so far the federal judiciary has not succeeded in this endeavor. There are many cases under the FHA and other civil rights statutes that

support either upholding or vacating [plaintiff's] punitive damages award." *Id.* After acknowledging the lack of guidance on this issue, the Fifth Circuit concluded that the distinction between constitutional and statutory violations is important. *Id.* Accordingly, punitive damages should be available absent an award of nominal or compensatory damages where a constitutional right has been violated but not where the right is merely statutory. *Id.*

Thus, from the carefully researched opinions of the Fourth Circuit and the Fifth Circuit, it is evident that a majority of states do not permit punitive awards absent nominal or compensatory damages awards and that federal civil rights cases draw a meaningful distinction between constitutional and statutory claims. Nevertheless, the Third Circuit in this case, without explanation, found that punitive damages awards are available in statutory cases absent nominal and compensatory damages. This Court should resolve the split and should be guided by the well-reasoned opinions of the Fourth and Fifth Circuits.

IV.

THE COURT OF APPEALS' DECISION ON VICARIOUS LIABILITY FOR PUNITIVE DAMAGES EXCEEDS THE OUTER BOUNDS OF THIS COURT'S RECENT DECISION IN *KOLSTAD*

The Court of Appeals has taken this Court's recent opinion in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), to such an unwarranted extreme that this Court should intervene before further damage is done. Though the Court of Appeals correctly noted that punitive damages may only be awarded where the "defendant's conduct is shown

to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others" (App. A at 19a, quoting *Smith v. Wade*, 461 U.S. 30, 56 [sic] (1983)), it has eviscerated that requirement by holding that a husband can be vicariously liable for his wife's discriminatory conduct. App. A at 26a.

There is no dispute that at the time the discriminatory conduct occurred, Mr. Riga was in Italy. App. A at 26a. Nevertheless, invoking *Kolstad*, the Court of Appeals found that Mr. Riga could be vicariously liable for punitive damages on agency principles unless he "engaged in active anti-discrimination efforts. . . ." App. A at 26a. Thus, although this Court in *Kolstad* was concerned with an employer's vicarious liability for punitive damages under Title VII, 42 U.S.C. § 1981(a)(b)(1), for discriminatory acts of an employee, the Court of Appeals has now extended such liability to co-owners of property sued under the FHA, including spouses who jointly own rental property. In so doing, the Court of Appeals has radically broadened the scope of vicarious liability for punitive damages, precisely what this Court was trying to avoid in *Kolstad*.

In *Kolstad*, this Court analyzed the punitive damages provision which Congress had passed as part of the Civil Rights Act of 1991 and the opinion is replete with language limiting the scope of punitive damages. The Court started with the proposition that "[p]unitive damages are limited . . . to cases in which the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' " 527 U.S. at 529-30. Punitive awards should be based solely on an employer's state of mind to "give some effect to Congress' apparent intent to narrow the class of

cases for which punitives are available to a subset of those involving intentional discrimination." *Id.* at 535.

Further limiting the reach of the provision, the Court noted that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. Further, the Court approvingly quoted a treatise for the proposition that " 'a positive element of conscious wrongdoing is always required.' " *Id.* at 538 (quoting C. McCormick, *Law of Damages* 280 (1935)). The Court then turned to the specific and unique issue of how punitive damages liability can be imputed to an employer. *Id.* It did not consider how punitive damages liability can be imputed to a husband for the actions of his wife or, more generally, to an owner of real estate for the actions of a co-owner.

Citing the Restatement (Second) of Agency, this Court again focused on the narrow scope to be given to punitive damages: the Restatement "places strict limits on the extent to which an agent's misconduct may be imputed to the principal for purposes of awarding punitive damages;" and this Court expressly refused to adopt, as far too broad in effect, the Restatement's position that punitive damages can be imposed on an agent " 'employed in a managerial capacity and . . . acting in the scope of employment.' " *Id.* at 542 (quoting the Restatement (Second) of Agency, § 217 C). Moreover, quoting the Restatement (Second) of Torts, the Court emphasized that "it is 'improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.' " *Id.* at 544 (quoting the Restatement (Second) of Torts § 909 at 468, Comment b).

Thus, only after painstakingly and repeatedly stressing the limited scope of punitive damages did this Court hold that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.' " *Id.* at 528 (quoting the appellate court's opinion at 139 F.3d at 974). Moreover, only three justices joined this part of the opinion (Part II-B). As the Chief Justice wrote, concurring in part and dissenting in part:

> I would hold . . . that there is an egregiousness requirement that reserves punitive damages only for the worst cases of intentional discrimination. . . . Since the Court has determined otherwise, however, I join that portion of Part II-B of the Court's opinion holding that principles of agency law place a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages.

Id. at 547.

Notwithstanding this Court's circumscribed view of punitive damages, the Court of Appeals has radically expanded their availability. The Court in *Kolstad* was not passing on the availability of punitive damages against a husband for a wife's discrimination in violation of the FHA. It was adopting a narrow rule on the vicarious liability of employers for employment discrimination. Even expanding the scope of the opinion to encompass discrimination generally, the Court's holding is focused on employers, a distinction with great significance in the context of vicarious

liability. The Court should grant certiorari to correct the Court of Appeals' unwarranted expansion of vicarious liability for punitive damages.

CONCLUSION

In a terse yet bold opinion, the Court of Appeals for the Third Circuit has: (i) highlighted a circuit court split regarding Article III standing that has been evolving for ten years; (ii) created a new rule on causation that not only conflicts with decisions of this Court and another circuit court, but also will spawn more litigation under civil rights statutes; (iii) enunciated a rule on punitive damages that conflicts with other circuits; and (iv) departed radically from this Court's recent decision in *Kolstad*.

By granting this Petition, the Supreme Court can establish a clear rule on Article III standing for organizations, address the seminal issue of causation, and clarify the federal common law of punitive damages. These issues are not only important, they are certain to recur and multiply without clear guidance from this Court. Accordingly, Petitioners respectfully request that the Supreme Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS M. HARDIMAN
Counsel of Record
JOSEPH P. MCHUGH
REED SMITH SHAW & MCCLAY LLP
Attorneys for Petitioners
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-4230/7236